



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34- 34-93770; File No. SR-NYSEArca-2021-103]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Arca Equities Fees and Charges

December 14, 2021.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on December 1, 2021, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Equities Fees and Charges (“Fee Schedule”) to amend the criteria to qualify for the MPID Adding Tier pricing tier and adopt a per share credit for orders that provide liquidity in Tape B securities under the MPID Adding Tier. The Exchange proposes to implement the fee changes effective December 1, 2021. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to amend the criteria to qualify for the MPID Adding Tier pricing tier and adopt a per share credit for orders that provide liquidity in Tape B securities under the MPID Adding Tier.

The Exchange proposes to implement the fee changes effective December 1, 2021.

Background

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁴

While Regulation NMS has enhanced competition, it has also fostered a “fragmented” market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that “such competition can lead to the fragmentation of order flow in that stock.”⁵

⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7-10-04) (Final Rule) (“Regulation NMS”).

⁵ See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

Indeed, equity trading is currently dispersed across 16 exchanges,⁶ numerous alternative trading systems,⁷ and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly available information, no single exchange currently has more than 18% market share.⁸ Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange currently has less than 12% market share of executed volume of equities trading.⁹

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products. While it is not possible to know a firm's reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange venues to which a firm routes order flow. With respect to non-marketable order flow that would provide liquidity on an Exchange against which market makers can quote, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange.

Proposed Rule Change

Pursuant to the MPID Adding Tier pricing tier, the Exchange currently provides a per share credit for orders that provide liquidity in Tape A and Tape C securities. Specifically, to qualify for the pricing tier, an MPID is required to execute providing ADV in all securities that is

⁶ See Cboe U.S Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html>.

⁷ See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

⁸ See Cboe Global Markets U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

⁹ See *id.*

at least 2 times more than its providing ADV in 2Q 2021, as a percentage of CADV. A qualifying MPID receives a credit for providing liquidity in Tape A and Tape C securities of \$0.0028 per share if the MPID has at least 4 million shares of providing ADV during the billing month, or \$0.0029 per share if the MPID has at least 9 million shares of providing ADV during the billing month. The Exchange currently does not provide any credit under the MPID Adding Tier for orders that provide liquidity in Tape B securities.

With this proposed rule change, the Exchange proposes to adopt a per share credit for orders that provide liquidity in Tape B securities when an MPID executes providing ADV in all securities that is at least 2 times more than its providing ADV in 2Q 2021, as a percentage of CADV. As proposed, a qualifying MPID would receive a credit for providing liquidity in Tape B securities of \$0.0022 per share if the MPID has at least 4 million shares of providing ADV during the billing month. An MPID that has at least 9 million shares of providing ADV during the billing month would also receive a similar credit of \$0.0022 per share for providing liquidity in Tape B securities.

Additionally, the Exchange proposes to rename the current MPID Adding Tier that offers a credit of \$0.0028 per share in Tape A and Tape C securities and \$0.0022 per share in Tape B securities as MPID Adding Tier 2, and proposes to rename the current MPID Adding Tier that offers a credit of \$0.0029 per share in Tape A and Tape C securities and \$0.0022 per share in Tape B securities as MPID Adding Tier 1.

Finally, the Exchange proposes to adopt an alternative method to qualify for the renamed MPID Adding Tier 2. As proposed, to qualify for the renamed MPID Adding Tier 2 credit of \$0.0028 per share for providing liquidity in Tape A and Tape C securities and \$0.0022 per share for providing liquidity in Tape B securities, an MPID would be required to execute providing ADV in all securities that is at least 2 times more than its providing ADV in 2Q 2021, as a percentage of CADV, and have at least 4 million shares of providing ADV during the billing month, or 2 million shares of providing ADV during the billing month in Tape B securities.

The proposed rule change to adopt a new credit and an alternative method to qualify for the existing credits is designed to incentivize ETP Holders to increase liquidity-providing orders in Tape B securities they send to the Exchange, which would support the quality of price discovery on the Exchange and provide additional liquidity for incoming orders.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹¹ in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹²

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. With respect to non-marketable orders which provide liquidity on an Exchange, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly,

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

¹² See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

competitive forces reasonably constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

In particular, the Exchange believes the proposed rule change is reasonable because it provides an additional opportunity and amends an existing opportunity for ETP Holders to receive an enhanced rebate on qualifying orders in a manner that incentivizes increased order flow on the Exchange's equities platform. The Exchange believes the proposed new credit of \$0.0022 per share for orders that provide liquidity in Tape B securities under the MPID Adding Tier pricing tier is a reasonable means to encourage ETP Holders to increase their liquidity providing orders in Tape B securities each month over a predetermined baseline by offering liquidity providers an opportunity to receive an enhanced rebate. The Exchange believes the proposed change to adopt an alternative method to qualify for the renamed MPID Adding Tier 2 is reasonable because it provides ETP Holders with an additional way to qualify for the pricing tier's credits by providing liquidity in Tape B securities. The Exchange believes that the proposed alternative to qualify for the pricing tier utilizing a lower volume requirement of liquidity providing orders in Tape B securities is reasonable because the proposal provides firms with greater flexibility to reach the proposed volume tier across all Tape A, Tape B and Tape C securities, thereby creating an added incentive for additional ETP Holders to bring increased order flow to a public exchange.

The Exchange believes it is reasonable to provide the proposed credit to a qualifying MPID if it meets the tier's criteria because this would encourage individual MPIDs to send orders that provide liquidity to the Exchange, thereby contributing to robust levels of liquidity, which would benefit all market participants, and would promote price discovery and transparency. The Exchange believes the proposed change to adopt a new credit and an alternative method to qualify for existing credits is reasonable as these changes would provide an incentive for an ETP Holder's MPID to direct its order flow to the Exchange and provide

meaningful added levels of liquidity in order to qualify for the new and existing credits, thereby contributing to depth and market quality on the Exchange.

As noted above, the Exchange operates in a highly competitive environment, particularly for attracting order flow that provides displayed liquidity on an exchange. More specifically, the Exchange notes that greater add volume order flow may provide for deeper, more liquid markets and execution opportunities at improved prices, which the Exchange believes would incentivize liquidity providers to submit additional liquidity and enhance execution opportunities. The Exchange notes that other markets with which the Exchange competes currently offer its members an opportunity to earn rebates based on the activity of the member's MPID.¹³ The Exchange believes the proposed changes to the MPID Adding Tier continues to be a reasonable means to encourage ETP Holders to increase their liquidity on the Exchange.

The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and not unfairly discriminatory because they are available to all ETP Holders on an equal basis. They also provide additional benefits or discounts that are reasonably related to the value of the Exchange's market quality and associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, the Exchange is one of many venues and off-exchange venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based on members achieving certain volume thresholds.

The Exchange believes its proposal equitably allocates its fees among its market participants.

¹³ See BZX Fee Schedule, Footnote 2, Step Up Tiers, and Footnote 4, Single Investor MPID Tiers, at https://www.cboe.com/us/equities/membership/fee_schedule/bzx/.

The Exchange believes that the proposal represents an equitable allocation of fees and is not unfairly discriminatory because it would apply uniformly to all ETP Holders, in that all ETP Holders will be eligible for the proposed new credit and have the opportunity to meet the tier's criteria and receive the applicable rebate if such criteria is met. The enhanced rebate (proposed and existing) would apply automatically and uniformly to all ETP Holders that achieve the corresponding criteria. The proposed change is designed as an incentive to any and all liquidity providers interested in meeting the tier criteria to submit additional order flow to the Exchange and each will receive the associated rebate if the tier criteria is met. While the Exchange has no way of knowing whether this proposed rule change would definitively result in any particular ETP Holder qualifying for the proposed new credit, the Exchange anticipates a number of ETP Holders would be able to meet, or will reasonably be able to meet, the proposed criteria. However, without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder meeting the alternative method and/or qualifying for the proposed rebate. As stated, the proposed new credit and the proposed alternative method to qualify for existing credits are designed to provide an incentive for ETP Holders to submit additional liquidity across all Tapes to qualify for the corresponding rebates.

The Exchange believes that the proposal is not unfairly discriminatory. The Exchange believes it is not unfairly discriminatory to provide the proposed credit as the credit would be provided on an equal basis to all ETP Holders that add liquidity in Tape B securities and meet the MPID Adding Tier's requirements. The Exchange also believes that the proposed rule change is not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volume. The proposed changes to the MPID Adding Tier are designed as an incentive to any and all ETP Holders interested in meeting the tier criteria to submit additional order flow to the Exchange and each will receive the corresponding new and existing rebate if the tier criteria are met. The Exchange also notes that the proposed rule change

will not adversely impact any ETP Holder's pricing or their ability to qualify for other tiers.

Rather, should an ETP Holder not meet the criteria of the MPID Adding Tier pricing tier, the ETP Holder will merely not receive the corresponding rebate.

The Exchange believes it is not unfairly discriminatory to provide an alternative way to qualify for the per share credit under the MPID Adding Tier pricing tier, as the credit would be provided on an equal basis to all ETP Holders that meet the proposed alternative requirement under the renamed MPID Adding Tier 2. Further, the Exchange believes the proposed alternative requirement would incentivize ETP Holders to send their liquidity providing orders in Tape B securities to the Exchange to qualify for the enhanced rebate.

In the prevailing competitive environment, ETP Holders are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Moreover, this proposed rule change neither targets nor will it have a disparate impact on any particular category of market participant. The Exchange believes that this proposal does not permit unfair discrimination because the changes described in this proposal would be applied to all similarly situated ETP Holders and all ETP Holders would be subject to the same requirements. Accordingly, no ETP Holder already operating on the Exchange would be disadvantaged by the proposed allocation of fees. The Exchange further believes that the proposed changes would not permit unfair discrimination among ETP Holders because the MPID Adding Tier credits would be available equally to all ETP Holders.

Finally, the submission of orders to the Exchange is optional for ETP Holders in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard. The Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,¹⁴ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for ETP Holders. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."¹⁵

Intramarket Competition. The Exchange believes the proposed amendments to its Fee Schedule would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed changes represent a significant departure from previous pricing offered by the Exchange or its competitors. The proposed changes are designed to attract additional order flow to the Exchange, in particular with respect to Tape B securities. The Exchange believes that the proposed adoption of a new credit and the amendment to the volume requirement to qualify for an established tier under the MPID Adding Tier pricing tier would incentivize market participants to direct liquidity adding order flow to the Exchange, bringing with it additional execution opportunities for market participants and improved price transparency. Greater overall order flow, trading opportunities, and pricing transparency benefits all market participants on the Exchange by enhancing market quality and continuing to encourage ETP Holders to send orders to the Exchange, thereby contributing towards a robust and well-balanced market ecosystem.

Intermarket Competition. The Exchange operates in a highly competitive market in

¹⁴ 15 U.S.C. 78f(b)(8).

¹⁵ See Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange's market share of intraday trading (i.e., excluding auctions) is currently less than 12%. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)¹⁶ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁷ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)¹⁸ of the Act to determine

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(2).

¹⁸ 15 U.S.C. 78s(b)(2)(B).

whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2021-103 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2021-103. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You

should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2021-103 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier,

Assistant Secretary.

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¹⁹ 17 CFR 200.30-3(a)(12).